IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

SMITHFIELD FOODS, INC., MURPHY FARMS, and PRESTAGE-STOECKER FARMS, INC. Plaintiffs, v. THOMAS J. MILLER, Attorney General of the State of Iowa in His Official Capacity, Defendant.	)))))))))))))	Civil No. 4:02-CV-90324 DEFENDANT'S BRIEF IN SUPPORT OF DEFENDANT'S RESISTANCE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Introduction

Evil, like Beauty, must be in the eye of the Beholder. Plaintiffs unabashedly, even proudly, proclaim themselves the "largest vertically integrated hog producer in the world", and cite to the "efficiencies" of their operation as bringing benefits to producers and consumers alike. Congress and the Iowa Legislature, in contrast, have for decades restricted such corporate schemes, legislating on behalf of economic diversity and decentralization, as the opposite of this concentration.

Antitrust laws, and corporate ownership prohibitions, were enacted on the belief that concentration allows the large and powerful to control information, manipulate prices, and enforce abusive contract clauses against the small and powerless. The large and powerful have, at times successfully, argued that "Big is good for you" through the efficiencies created by their size and corporate relationships. But efficiencies are only "good" if passed on to the producer and consumer. When large corporations, like the Plaintiffs achieve record profits, is it because of efficiencies in their production, or because production prices were controlled, and driven below competitive levels? The question cannot be reliably answered without information, i.e. transparent markets, which lead to free, open and competitive markets. It is to that end and purpose the Iowa Legislature enacted Iowa Code chapter 9H.

Standard of Review

The trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. 1348.

9H.2 Does Not Facially Discriminate

According to Iowa law, in order "to preserve free enterprise, prevent monopoly, and also to protect consumers," swine processors cannot "[d]irectly or indirectly own, control, or operate a swine operation in this state," "[f]inance a swine operation in this state or finance a person who directly or indirectly contracts for the care and feeding of swine in this state," "[o]btain a benefit or production associated with feeding or otherwise maintaining swine, by directly or indirectly assuming a morbidity or mortality production risk, if the swine are fed or otherwise maintained as part of a swine operation in this state or by a person who contracts for the care and feeding of swine in this state," "[d]irectly or indirectly receive the net revenue derived from a swine operation in this state or from a person who contracts for the care and feeding of swine in this state," or "[d]irectly or indirectly contract for the care and feeding of swine in this state." Iowa

Code §§ 9H.2(1)(b)(1)(a)-(d), 9H.2(1)(b)(2). Iowa law applies to swine processors in general and no distinction is made between in-state and out-of-state swine processors. As a result, Plaintiffs cannot plausibly maintain that Iowa law discriminates against out-of-state swine processors. Plaintiffs' claim that 9H.2 constitutes "protectionist legislation" that "shield[s] in-state agricultural interests from external competition by vertically integrated entities" should be rejected. (Pls.' Brf. at 1-2). Contrary to Plaintiffs' claim "that only Iowans can practice vertical integration in Iowa," 9H.2 applies universally. (Pls.' Brf. at 3). Consequently, all Plaintiffs' citations to case law addressing "differential treatment of in-state and out-of-state economic interests" are non-applicable to the present circumstances. (Pls.' Brf. at 5).

Since the Iowa "statute does not favor in-state businesses or disfavor out-of-state businesses," the statute is not discriminatory. *American Meat Inst. v. Barnett*, 64 F. Supp. 2d 906, 919 (S.D.1999). The Eighth Circuit Court of Appeals, when upholding a state statute designed to protect the integrity of Missouri's agricultural economy by prohibiting packer price discrimination between large and small producers, noted that the South Dakota court in *American Meat Inst.* "found that the pricing statute did not favor in-state business over out-of-state business, and therefore did not directly burden interstate commerce on its face." *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 818-19 (8th Cir. 2001). According to Eighth Circuit precedent, "[i]n a Commerce Clause context, 'discrimination' means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995)(upholding a Minnesota statute prohibiting the sale of petroleum-based sweeping compounds in Minnesota against a Dormant Commerce Clause challenge). *See also U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067-68 (8th

Cir. 2000)(upholding a neutrally-worded Nebraska law requiring waste to be processed at a city-owned facility and rejecting the argument that the law was facially discriminatory, despite the law's impact on a particular company). Since in-state and out-of-state interests are treated equally by 9H.2, Plaintiffs' discrimination claim should be rejected.

9H.2's Cooperative Exemption Is Legally Sound

Plaintiffs contest the cooperative exemption afforded by Iowa law. *See* Iowa Code § 9H.2(1)(b)(2). The exemption applies to Iowa cooperatives or to non-Iowa cooperatives with an Iowa cooperative affiliate. *Id.* If a cooperative does not have an affiliate organized under Iowa law, then the cooperative does not conduct business in the state of Iowa and therefore would not be affected by the statute. Since Iowa law contains no requirement that a non-Iowa cooperative be physically present in Iowa ir order to be organized under Iowa law, 9H.2 does not discriminate between Iowa and non-Iowa cooperatives. Iowa Code chs. 497, 498, 499, 501.

The unique treatment of cooperatives is widely-recognized. In a recent South Dakota decision cited for other purposes by Plaintiffs, a court reviewed a Dormant Commerce Clause challenge to South Dakota's constitutional restriction on corporate farming. The court recognized the "legitimate state interests" at stake when "seeking to prevent in the future agricultural land and production of animals and crops from passing into the hands of limited liability entities to the detriment of traditional family farm units and family farm limited liability entities primarily engaged in farming or ranching, and seeking to protect family life and values." *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020, 1023 (S.D. 2002). The court also noted that "South Dakota may make reasonable distinctions between business entities" and specifically reviewed the cooperative exemption from the corporate farming prohibition, noting that a "cooperative receives very different treatment under federal laws than does a corporation." *Id.* at 1023, 1031. Nowhere in the court's decision did it find the differential treatment of cooperatives to constitute discrimination. Generally, the court "decline[d] to find [a] sufficient discriminatory purpose" to the corporate farming prohibition and held that the effect of the prohibition "does not translate into unconstitutional discrimination and the contentions of the plaintiffs in this regard are rejected." *Id.* at 1047-48. The *Farm Bureau* decision indicates that the differential treatment of cooperatives is not susceptible to Constitutional attack via the Dormant Commerce Clause.

The United States Supreme Court has also endorsed the differential treatment of cooperatives. When reviewing a statute that specifically exempted farmer cooperatives from a statute's requirements on equal protection grounds, the Supreme Court fully recognized the disparity in bargaining power between farmers and large-scale corporations and the importance of the unique treatment of farmer cooperatives. Similar to contemporary concerns about the economic and social consequences of vertical integration, the Court noted that a Texas antitrust statute which exempted cooperatives "had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise." *Tigner v. Texas*, 310 U.S. 141, 145 (1940). Similarly, the Iowa law in question was designed to "preserve free and private enterprise, prevent monopoly, and protect consumers." Iowa Code § 9H.2. In *Tigner*, the Supreme Court noted the laws passed by states which had legitimately distinguished between agricultural and corporate entities: "an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the antitrust laws; have relieved their organizations from taxation." *Tigner v. Texas*, 310 U.S. at 145-46. The court also noted that "[a]t the core of all these [state and federal laws differentiating between industry and agriculture] lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by antitrust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process." *Id.* at 146-47.

The unique treatment of cooperatives has long been a part of federal agricultural policy. The Clayton Act, adopted in 1914, exempted non-stock agricultural cooperatives from the antitrust laws. 15 U.S.C. § 17. The Capper-Volstead Act, adopted in 1922, extended the antitrust exemption to all cooperatives. 7 U.S.C. §§ 291-292. The Capper-Volstead Act, along with the Cooperative Marketing Act of 1926, "implied full-scale governmental approval of the cooperative form of organization and policy of giving active support in creating and strengthening agricultural cooperatives." Murray A. Benedict, *Can We Solve the Farm Problem?* 89 (1955). According to the Second Circuit Court of Appeals, "agricultural cooperatives were a 'favorite of Congressional policy.'" *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1043 (2nd Cir. 1980)(quoting 5 Toulmin, *Antitrust Laws* § 6.1, at 334 (1950)). The Supreme Court of Kansas also noted that "cooperative marketing associations are fostered and encouraged by legislative enactment and judicial construction." *Classen v. Farmers Grain Coop.*, 490 P.2d 376, 381 (Kan. 1971). Such encouragement can be found in the favorable tax treatment extended to cooperatives, I.R.C. § 521(b), and in the cooperative exemption from the registration requirements of the securities laws. 15 U.S.C. § 78*l*(g)(2)(E)-(F). Long-standing judicial precedent and federal and state laws demonstrate the legitimacy of treating cooperatives differently, undermining Plaintiffs' discrimination claims.

Cooperatives are favored by legislatures and courts because they counter the monopoly power of agribusiness processors, whose vertical integration efforts concern the State of Iowa and justifies 9H.2. Exemptions from certain statutory obligations were designed to allow farmer cooperatives to counter the power of large-scale corporate buyers such as packers: "The exemption of labor and agricultural combinations from the Sherman Act's proscriptions further demonstrates that a deep concern about social balance lay beneath statements of solicitude for those harmed by the trusts. Several senators advocated exemption on the ground that such combinations were necessary to counterbalance the economic power of massed capital." David Millon, *The Sherman Act and the Balance of Power*, 61 S. C. L. REV. 1219, 1281 (1988). The United States Supreme Court has held that "individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage-and responsibility-available to businessmen acting through corporations as entities." *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960). Commentators have noted that "Congressional passage of the agricultural antitrust exemption encouraged the formation of agricultural cooperatives [which were] intended to counterveil the monopsony [buying] power then held by corporate purchasers." David L. Baumer, et al., *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemptions for Agriculture*, 31 Vill. L. Rev. 183, 185 (1986). The cooperative exemption from 9H.2 fully complies with long-standing legislative attempts to address the problem of agribusiness power that 9H.2 also addresses. The United States Supreme Court has specifically explained that federal laws promoting cooperatives were designed to "ameliorate" the problems of small, disorganized farmers and "to deal with the problems of participation of small economic units in an economy increasingly dominated by economic titans." *National Broiler Marketing Ass'n v. United States,* 436 U.S. 816, 830-31 (1978)(Brennan, J., concurring). The legislation allowed individual farmers "to survive against the economically dominant manufacturing, supplier, and purchasing interests with which they had to interrelate." *Id.* at 830. The Capper-Volstead Act, for example, sought to address the "disparity of power between" farmers and the "behemoths of agribusiness." *Id.* at 830, 834. The Capper-Volstead Act, the Court noted, indicated "Congress' manifest purpose to protect the small, individual economic units engaged in farming from exploitation and extinction at the hands of 'these large aggregations of men who control the avenues and agencies through and by which farm products reach the consuming market,' 62 Cong. Rec. 2058 (1922)(remarks of Sen. Capper)." *Id.* at 835. Such legislation complemented the Sherman Antitrust Act (which was amended by the Capper-Volstead Act), which was aimed at "these great trusts, these moneyed corporations, these large moneyed institutions." *Id.*

Combating Vertical Integration is a Recognized Legislative Practice

The Iowa statute attempts to eliminate the evils of vertical integration. Such statutes have specifically been upheld by the United States Supreme Court. In *Exxon Corporation v. Maryland*, the Supreme Court rejected an attack on a state law which prohibited large oil companies from granting preferential treatment to in-state gas stations owned by the oil companies. 437 U.S. 117 (1978). The statute required the oil companies to divest themselves of in-state gas retail operations. *Id.* at 121. Changing the market structure of the gas retailing industry by requiring oil companies to divest themselves of vertically-related operations, the Court held, did not burden interstate commerce: "We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular market structure or methods of operation in a retail market." *Id.* at 127 (citation omitted). Similarly, an Iowa statute changing the market structure of the livestock procurement market by prohibiting the vertical integration of large-scale meatpackers cannot conflict with the Commerce Clause. That out-of-state entities may be affected by a neutrally-applied statute does not make the statute unconstitutional.

Vertical integration, which frustrates proper price discovery and thereby undermines the workability of markets, undermines the family farm system. "It is in the national interest to encourage and protect family farms and ranches and to enhance and promote the stability and well being of rural America. More competitive markets would result in higher prices to producers. Equal access to accurate pricing and purchase information would improve the competitiveness of the livestock market. Poor or no information can lead to unnecessary price volatility and tardy or inaccurate adjustments to changing supply and demand conditions. Inadequate or uneven information can cause producers to be disadvantaged, relative to packers. Disclosure of prices fosters competition and results in an efficient functioning of the market." *American Meat Inst. v. Barnett*, 64 F. Supp.2d 906, 919-920 (S.D.1999).

Protecting farmers from the ability of packers to manipulate the open market for livestock has been codified in the form of the Packers and Stockyard Act. The statute, the most comprehensive piece of economic regulation to date in American history, specifically prohibits packers from engaging in any business practices "for the purpose or with the effect of restraining commerce or of creating a monopoly." 7 U.S.C. § 192(e). "The Act was framed in language designed to permit the fullest controls of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce and give the Secretary of Agriculture complete regulatory power over packers and all activities connected therewith." *Bruhn's Freezer Meats of Chicago v. USDA*, 438 F.2d 1332, 1339 (8th Cir. 1971). Recognizing the pernicious consequences of vertical integration, the Packers and Stockyards Administration has, in the past, "taken a firm stance in opposition to such vertical integration." David H. Rosenberg, *Vertical Integration in the Cattle Feeding Industry and the Packers and Stockyards Administration*, 7 Toledo Law Rev. 935 (Spring 1976). In December of 2001, in response to concerns over the vertical integration of livestock markets, the United States Senate passed an amendment to the Packers and Stockyards Act which made it unlawful for packers to own, feed, or control livestock intended for slaughter more than fourteen days prior to slaughter. Similar to the Iowa statute, the legislation also exempted cooperatives from the prohibition. Nebraska has also banned packer ownership of livestock. Neb. Rev. Stat. § 54-2602. Since the negative consequences of vertical integration have long been recognized and federal and state governments have worked to prevent it, Iowa's legislative effort to arrest its growth cannot plausibly be attacked as unconstitutional.

Iowa has Adopted a Reasonable Means to Combat Vertical Integration

While the State of Iowa believes the regulation of vertical integration codified in 9H.2 is fully-justified and non-discriminatory, as stated above, should the Court find the statute discriminatory, the State of Iowa believes it should be upheld. According to the Supreme Court, if a statute is discriminatory, it will still be upheld if the state "has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994). Courts reviewing corporate farming laws, which were adopted to prevent large-scale corporations from vertically integrating into production agriculture, have recognized the legitimate interests pursued by states. As the Eighth Circuit Court of Appeals has already held when upholding a Nebraska corporate farming statute, protecting the integrity of an independent agricultural system is a legitimate state interest and the "people of Nebraska could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land." *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991). The Eighth Circuit concluded that large-scale, corporate farms would "adversely affect the rural and social and economic structure [and undermine] this country's historical reliance on family or dispersed farm ownership." *Id.* When upholding Missouri's prohibition on corporate farming, the Missouri Supreme Court similarly noted the Missouri legislature's legitimate fear of a "detrimental impact on traditional farming entities." *Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805-6 (Mo. 1988). South Dakota has also recognized the "importance of the family farm to the economic and moral stability of the state, and the Legislature recognizes that the existence of the family farm is threatened by conglomerates in farming," SDCL 47-9A-1, and Minnesota has noted that it "is in the interest of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society." Minn. Stat. Ann. 500.24(1). When upholding a Missouri statute prohibiting packers from paying large and small farmers different prices for livestock, the Eighth Circuit also noted that "Missouri present[ed] several legitimate justifications for passing the price discrimination statute" including that it "would preserve the family farm and Missouri's rural economy by preventing packers' discriminatory treatment among different classes of producers." *Hampton Feedlot*, 249 F.3d at 820. Protecting the traditional family-farm structure of agriculture from the consequences of vertical integration is a legitimate state interest.

According to Harl, 9H.2 is Iowa's only alternative:

> Legislature's only option to address the negative impacts of vertical integration on proper market function was to prohibit vertical integration as was done in section 9H.2. The reason for this is that by definition, vertical integration eliminates price discovery and replaces it with a system of negotiated prices that is subject to all of the market distorting forces referred to infra.

(Harl Aff., ¶ 15 (App. C-3).)

The "Coop Exception" is Severable From the Remainder of Iowa Code Section 9H.2

The State of Iowa believes the regulation of vertical integration codified in 9H.2 is fully-justified and non-discriminatory. However, should the court find that the "coop processor exception" contained in section 9H.2 is discriminatory, the offending exception language should be severed and the remainder of section 9H.2 should be given full force and effect.

Severability is a matter of state law. *Jones v. Vilsack*, 272 F.3d 1030, 1038 (*citing* *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996)). Iowa favors severance of invalid statutory provisions. *Id.* (*citing* Iowa Code § 4.12). Iowa Code chapter 9H *et seq.* itself contains a 'severability' provision that expressly identifies the legislature's intent that if any provision of chapter 9H is found invalid, such invalidity should not affect the other provisions of the chapter.

S.F. 2309 (App.). In *Jones* the court clarified the test under Iowa law stating "severance is appropriate if it does not impair the legislative purpose, if the enactment remains capable of fulfilling the apparent legislative intent, and if the remaining portion of the enactment can be given effect without the invalid provision." *Jones*, 272 F.3d at 1038 (*quoting Am. Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991)).

The legislative purpose of section 9H.2 is "preserve free and private enterprise, prevent monopoly, and to protect consumers." Iowa Code § 9H.2. In order to address the damage done to "free and private enterprise" by vertical integration, the legislature prohibited "processors" from "directly or indirectly contracting for the care and feeding of swine" in Iowa. *Id.* However, because of the unique place they hold in agriculture, the legislature did not extend this prohibition to cooperatives that met the qualifications identified in the statute. *Id.* Clearly, eliminating or severing the "coop processor exception" would not impair the broader legislative purpose behind the general prohibitions against "processor"contained in section 9H.2. *Jones*, 272 F.3d at 1038. Therefore, should the court find that the "coop exception" contained in section 9H.2 is facially invalid, it should be severed and the remainder of section 9H.2 should be given full force and effect. *Id.*

The Iowa Legislature Had A Legitimate Legislative Purpose

in Passing and Amending Section 9H.2

Plaintiffs assert that the Iowa Legislature had a "discriminatory purpose" when it passed and amended Iowa Code section 9H.2, and as a result, Iowa Code section 9H.2, on its face, violates the Dormant Commerce Clause of the United States Constitution. (Pls.' Mot. Summ. J.

¶¶ 1 & 2; and Pls.' Mem. 8-13). However, Plaintiffs have failed to establish that the legislature had any purpose other than "to preserve free and private enterprise, prevent monopoly, and also to protect consumers" when it passed and amended Iowa Code section 9H.2. Therefore, Plaintiffs' claim that section 9H.2 is facially invalid because of its "discriminatory purpose" should be rejected.

A court's ultimate goal in interpreting statutes is to determine legislative intent. *Lemars Mut. Ins. Co. of Iowa v. Bonnecroy*, 304 N.W.2d 422, 424 (Iowa 1981). The first step in this process is an evaluation of the language of the statute. An express declaration of policy contained in a statute as evidence of the legislature's intent concerning the entire statute. *Burlington Cmty. Sch. Dist. v. Pub. Employment Relations Bd.*, 268 N.W.2d 517, 522 (Iowa 1978). Rules of statutory construction are to be resorted to only when the terms of the statute are ambiguous. *Bonnecroy*, 304 N.W.2d at 424. In the absence of ambiguity, the language of the statute is given its plain and rational meaning. *Id.* Cannons of statutory construction, when properly applied, are useful tools, but are only aids to judicial interpretation which should not be applied when there is no ambiguity. *United States v. Vig*, 167 F.3d 443, 448 (8th Cir. 1999) *cert. denied* 528 U.S. 859 (1999). The court in *Northern States Power Co. v. United States*, identified the risks of looking to evidence outside the language of the statute stating "We think that when, as here, the statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Northern States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996) *cert. denied,* 519 U.S. 862 (1996).

Inexplicably, plaintiffs fail to address the most important evidence of the legislature's intent and purpose, the language of the statute itself. *Bonnecroy*, 304 N.W.2d at 424. One reason may be that Iowa's legislative purpose (protection of the markets and market functions that have served farmers and consumers so well) has been expressly held to be a constitutionally legitimate state interest. *Hazeltine*, 202 F. Supp. 2d at 1049. The value of properly functioning markets, including price discovery, increases in circumstances where the participants in a market have vastly different levels of market power and knowledge. *See* Dr. Harl's Aff. ¶¶ 9-15 (App. C-1--C-3). The difference in market power and market knowledge between individual farmers and consumers and Smithfield Foods, Inc., is a classic example of this disparity. *Id.* Smithfield has shown itself to be very willing to take advantage of comparative economic power. One example is Smithfield's policy of not providing its growers with financial information concerning its hog operations. *See* Randy Stoecker Test. (July 11, 2001), *Smithfield I* (App. G-4). Another example is Smithfield's threat to close a South Dakota packing plant if United States Senator Tim Johnson and the voters he represented continued to support federal legislation that would prohibit packers from owning livestock. (App. K-1--K-3.) Clearly, Smithfield's actions have verified the need to pursue the purposes expressly identified in section 9H.2.

Section 9H.2 expressly states "the purpose of this section is to preserve free and private enterprise, prevent monopoly, and also to protect consumers." Iowa Code § 9H.2. This language is "clear, certain, and unambiguous" and as a result, the Court need look no further to ascertain the legislature's intent and purpose in passing section 9H.2. *Bonnecroy*, 304 N.W.2d at 424; *Burlington Cmty.*, 268 N.W.2d at 522; and *Northern States Power*, 73 F.3d at 766.

While Plaintiffs fail to address the express "legislative purpose" language contained in section 9H.2, they do cite to a completely unrelated section of the Iowa Code (Iowa Code § 15E.203(2)(a) (2001)) and language contained in an advertising supplement sponsored by the Iowa Governor's Office as "objective sources" of the legislature's intent in amending Iowa Code section 9H.2. (Pls.' State. of Material Facts ¶ 3; and Pls.' Mem. at 13.) However, Plaintiffs' do not, nor could they, assert that these materials were part of the legislative history or process surrounding the passage and/or amendment of section 9H.2. Plaintiffs rely on these materials as evidence of legislative intent or purpose without citing to any authority supporting such use. Plaintiffs' failure to cite supporting authority is probably explained by the fact that the use of this type of unrelated material to establish legislative intent is completely outside the scope of accepted statutory construction doctrine. *Bonnecroy*, 304 NW.2d at 424; *Burlington Ctmy.*, 268 N.W.2d at 522; and *Northern States Power*, 73 F.3d at 766.

Plaintiffs' also include as part of their Appendix a reference to a newsletter of Iowa State Senator Stewart Iverson as evidence of improper legislative intent. (Compl. ¶ 95, (App. 27)). The inherent unreliability of this type of evidence renders it inadmissable to establish legislative intent. *Iowa State Ed. Association-Higher Ed. Ass'n v. Pub. Employment Relations Bd.*, 269 N.W.2d 446, 448 (Iowa 1978); *American Meat Inst. v. Barnett*, 64 F. Supp. 2d 906, 916 (D. S.D. 1999).

The plaintiffs cite *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1994), as being "dispositive of this case." (Pls.' Mem. at 9.) However, the facts of *SDDS* are easily distinguished from the facts of this case. Most importantly, the court in *SDDS* was considering a pamphlet that the statute in question expressly required the South Dakota Attorney General to prepare and include as part of the voter-referendum mandated by that statute. *SDDS, Inc.*, 47 F.3d at 266. In addition, the State of South Dakota **expressly agreed** that this legislatively-mandated pamphlet was part of the legislative history of the voter-referendum legislation at issue in the case. *Id.*, (emphasis added). The court in *SDDS* based its holding that the legislation at issue had a "discriminatory purpose" on its finding of "protectionist propaganda" in the above-referenced pamphlet. *Id*, at 270. Clearly, the Plaintiffs' attempt to use unrelated statutes and advertisements that are **not** expressly part of the legislative history surrounding the passage and amendment of section 9H.2 is not supported by the court's analysis and holding in *SDDS. Id.*

The express legislative purpose of Iowa Code section 9H.2 as amended is "to preserve free and private enterprise, prevent monopoly, and also to protect consumers." Iowa Code § 9H.2. This language is "clear, certain, and unambiguous" and as a result, the court need look no further to ascertain the legislature's intent and purpose in passing section 9H.2. *Bonnecroy*, 304 N.W.2d at 424; *Burlington Cmty.*, at 522; and *Northern States Power*, 47 F.3d at 766. Therefore, the Plaintiffs' claim that section 9H.2 had a discriminatory legislative purpose should be rejected.

Iowa Code Section 9H.2 Does Not Result in Extraterritorial Regulation

Plaintiffs assert that Iowa Code section 9H.2 (2002), on its face, attempts to engage in the extraterritorial regulation of interstate commerce in violation of the Dormant Commerce Clause of the United States Constitution. (Compl. ¶. 148; Pls.' Mot. Summ. J. ¶ .) To the contrary, Iowa Code section 9H.2 regulates only the **intrastate** contracting for the care and feeding of swine and applies equally to both instate and out-of-state processors. Therefore, Plaintiffs' claim that section 9H.2, on its face, engages in extraterritorial regulation should be rejected.

Under the Commerce Clause, a state regulation is per se invalid when it has an "extraterritorial reach" that is, when the statute has the practical effect of controlling conduct that is beyond the boundaries of the state. U.S. Const. art. I, § 8, cl. 3; *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (citing *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). In other words, the Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of a state's borders. *Id.*

Surprisingly, while the Plaintiffs' cite to over forty different cases, they failed to cite either *Cotto Waxo* or *Hampton Feedlot* which Defendant believes are directly controlling on this issue. *Cotto Waxo*, 46 F.3d at 792; *Hampton Feedlot*, 249 F.3d at 816-17. Such oversight is not without some risk.. *See Jewelpak Corp. v. United States*, 297 F.3d 1326, 1331 n.6 (Fed. Cir. 2002) (noting the court's "significant dismay at counsel's failure to cite" a particularly relevant case); *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989) ("a party is not entitled to deliberately ignore . . . case law that is unfavorable to its position").

While the Plaintiffs fail to cite *Cotto Waxo* and *Hampton Feedlot*, they do cite to an opinion of a "district court in this circuit", *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F. Supp. 2d 1020 (D. S.D 2002) *appeal docketed,* No. 02-2366 (May 29, 2002) for the proposition that the court struck down an amendment to South Dakota's state constitution because it "appear[ed] to be designed to prohibit large corporations ... from vertically integrating an industry to the competitive exclusion of the [family] farmer." (Pls.' Mem. at 6, 13, (citing

Hazeltine, 202 F. Supp. 2d at 1049.) Read in its entirety, *Hazeltine* supports neither Plaintiffs' legal or factual grounds.

First, the court in *Hazeltine* did not conclude that the South Dakota statute in question was facially invalid, but instead relied on the *Pike* balancing test to hold that the burdens of the statute's provisions regulating **interstate utility corridors** outweighed the local benefits of those restrictions, resulting in a violation of the Dormant Commerce Clause. *Hazeltine*, 202 F. Supp. 2d at 1049 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))(emphasis added). Second, contrary to the Plaintiffs' inference, the court in *Hazeltine*, expressly **approved** the efforts of not only South Dakota, but also North Dakota and Nebraska to enact limited liability farming bans designed to protect their respective family farmers from the economic pressures of vertical integration:

> It is within the province of the legislature to enact a statute which regulates the balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community, and such a statute is rationally related to a legitimate state interest.

Id. at p. 1049 (citing *State ex rel. Webster v. Lehndorff Geneva, Inc*, 744 S.W.2d 801, 806 (Mo.1988)). And more specifically, as to South Dakota's efforts to further that state interest, the court concluded "that Amendment E does not suffer from an unconstitutional extraterritorial reach as to out-of-state farmers or out-of-state limited liability entities." *Id.* at 1047. The Plaintiffs' attempts to infer any support for "vertical integration" in *Hazeltine*, are at best misguided.

In *Cotto Waxo*, the United States Court of Appeals for the Eighth Circuit considered a facial challenge under the Dormant Commerce Clause of a Minnesota statute that prohibited the sale of petroleum-based sweeping compounds in Minnesota. *Cotto Waxo*, 46 F.3d at 792. The court rejected the appellant's (manufacturer of the petroleum-based sweeping compound) argument that the Minnesota statute discriminated against interstate commerce because it negatively affected the appellant's business outside the state of Minnesota stating:

> The Act does not require Cotto Waxo to conduct its commerce according to Minnesota terms. Clearly, the Act has affected Cotto Waxo's participation in interstate commerce. Nevertheless, the Act itself is indifferent to sales occurring out-of-state. Cotto Waxo is able to sell to out of state purchasers regardless of Cotto Waxo's relationship to Minnesota. We conclude that the Act does not suffer from an unconstitutional extraterritorial reach.

Id., at 794. Based on these findings, the court expressly held that "negatively affecting interstate commerce is not the same as discriminating against interstate commerce." Id.

Even more relevant, the United States Court of Appeals for the Eighth Circuit has recently applied the standard set out in *Cotto Waxo* to a facial challenge under the Dormant Commerce Clause of a Missouri statute regulating the livestock industry. *Hampton Feedlot*, 249 F.3d at 816-817. The Missouri statute considered by the court in *Hampton Feedlot*, provided that "[a] packer purchasing or soliciting livestock in this state for slaughter shall not discriminate in prices paid or offered to be paid to sellers of that livestock." Mo. Ann. Stat. § 277.203. The appellees (cattle feedlot operators and beef industry associations) argued that by discouraging out-of-state packers from buying livestock in Missouri, Missouri's price discrimination law had a chilling effect on interstate commerce. *Hampton Feedlot*, at 819. The Court expressly rejected the plaintiffs' argument stating "There can be no chilling effect on interstate commerce if packers can just as easily purchase Nebraska or Kansas livestock for slaughter if they do not purchase Missouri livestock." *Id.* Applying the "affecting interstate commerce is not the same thing as burdening interstate commerce" rationale of *Cotto Waxo,* the court held that Missouri's price law did not, on its face, engage in extraterritorial regulation. *Id.*

In addition to setting out the analysis to be applied to "extraterritorial regulation" claims, the court in *Cotto Waxo* and *Hampton Feedlot* expressly distinguished several of the cases cited by the plaintiffs. *Cotto Waxo*, 46 F.3d at 793-794; *Hampton Feedlot*, 249 F.3d at 818-19. In *Cotto Waxo*, the court noted that the state statutes found to be violative of the Dormant Commerce Clause in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), effectively set or controlled the **out-of-state** prices that entities could charge for the commodities regulated by the respective state statutes. *Id.* (Emphasis added). The court in *Cotto Waxo* expressly distinguished the Minnesota statute before it in that case, ruling that while the Minnesota statute prohibited the sale of a product in Minnesota, it did not engage in extraterritorial regulation since, unlike the state statutes in *Baldwin* and *Brown-Forman,* it was indifferent to sales of the regulated product occurring outside Minnesota. *Id.*

The court in *Hampton Feedlot*, noted that the South Dakota statute at issue in *American Meat Inst.*, 64 F. Supp. 2d at 906, applied to livestock slaughtered in South Dakota, regardless of where the livestock was purchased, resulting in South Dakota's regulation of cattle sales in other states. *Hampton Feedlot*, 249 F.3d at 818-19. The court in *Hampton Feedlot* distinguished the Missouri statute before it stating:

> The Missouri statute, on the other hand, only regulates the sale of livestock sold in Missouri. If enacted, it may have the effect of increasing the price that packers pay and producers receive for livestock fed in Missouri, but the extraterritorial reach that the district court found in the South Dakota Statute does not exist in the application of the Missouri statute.

Id., at p. 819. Since the Missouri statute did not affect the ability of packers to use whatever pricing mechanism they wanted outside of Missouri, the court held that the Missouri price discrimination statute did not violate the Dormant Commerce Clause. *Id.*

Likewise, Iowa Code section 9H.2 has no impact on Smithfield outside Iowa. Plaintiffs' assert that "[b]ecause Iowa Code section 9H.2 dictates that Plaintiffs cannot contract for the care and feeding of swine in Iowa if they process non-Iowa hogs outside of Iowa, the unconstitutionality of this statute under established dormant Commerce Clause jurisprudence *is not subject to reasonable dispute.*" (Pls.' Mem. at13 (emphasis added).) Plaintiffs make this assertion without citation to any portion of section 9H.2 which mandates the prohibitions on "contracting" are expressly contingent on a "processor" processing livestock outside Iowa. Iowa Code § 9H.2. This lack of citation is understandable since section 9H.2 contains no such language. *Id.* To the contrary, the language of section 9H.2 contains no effort to regulate "processing" wherever it takes place. *Id.* The only activity that section 9H.2 does regulate is contracting, and activities related to contracting (financing, assuming morbidity risk and directly or indirectly receiving the net revenue) for the care and feeding of swine that takes place within Iowa. *Id.* (App).

The prohibitions contained in Iowa Code section 9H.2 are analogous to the prohibitions contained in the state statutes considered by the United States Court of Appeals for the Eighth

Circuit in *Cotto Waxo* and *Hampton Feedlot*, i.e. there is no attempt to in any way regulate activities (contracting or any activities related to contracting for the care and feeding of swine) that occur outside the State of Iowa. Iowa Code § 9H.2; *Cotto Waxo*, 46 F.3d at 794; *Hampton Feedlot*, 249 F.3d at 819. The court in both the *Cotto Waxo* and *Hampton Feedlot* expressly cites to the ability of the challenging party to engage in the regulated activity outside the regulating state's borders the best evidence that the statutes in question were not constitutionally invalid extraterritorial regulations. *Cotto Waxo, 46 F.3d* at 794; *Hampton Feedlot*, 249 F.3d at 819. In this case, Plaintiffs actually do contract for the care and feeding of swine outside the state of Iowa. Randy Stoecker, who simultaneously serves as the Manager of Smithfield's Midwest pork production operations and owner of 49% of Prestage Stoecker Farms, testified that 20-25% of the hogs Smithfield/Murphys contracts with growers to finish in the Midwest are finished in states other than Iowa. (App. D4; D7; G-2; H-3.) In addition, the processor that has been slaughtering the Plaintiffs' hogs expressly stated that those hogs came from several states other than Iowa, i.e. Illinois, Missouri, Minnesota, South Dakota, and Nebraska. (App. I-2).

Given that the prohibitions contained in section 9H.2, in theory and in fact, affect only contracting for the care and feeding of swine by processors **in Iowa,** Plaintiffs' claim that section 9H.2, on its face, attempts to engage in the extraterritorial regulation in violation of Commerce Clause of the United States Constitution should be rejected. *Healy v. Beer Inst.*, 419 U.S. at 336; *Cotto Waxo*, 46 F.3d at 794; *Hampton Feedlot*, 249 F.3d at 819.

Conclusion

Iowa Code 9H seeks to maintain a window to the market, through which information can pass freely, thus preserving those markets as open and competitive. Plaintiffs objective here is nothing more than close that window. Their attempt must be denied.

Respectfully submitted,

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